

Sep 10, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LAURA H.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:17-cv-00295-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 21, 22

BEFORE THE COURT are the parties' cross-motions for Summary Judgment. ECF Nos. 21, 22. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 21, and grants Defendant's Motion, ECF No. 22.

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

“A finding of ‘disabled’ under the five-step inquiry does not automatically qualify a claimant for disability benefits.” *Parra v. Astrue*, 481 F. 3d 742, 746 (9th Cir. 2007) (citing *Bustamante v. Massanari*, 262 F.3d 949, 954 (9th Cir. 2001)).

When there is medical evidence of drug or alcohol addiction (DAA), the ALJ must determine whether the drug or alcohol addiction is a material factor contributing to the disability. 20 C.F.R. §§ 404.1535(a), 416.935(a). In order to determine whether drug or alcohol addiction is a material factor contributing to the disability, the ALJ must evaluate which of the current physical and mental limitations would remain if the claimant stopped using drugs or alcohol, then determine whether any or all of the remaining limitations would be disabling. 20 C.F.R. §§

1 404.1535(b)(2), 416.935(b)(2). If the remaining limitations would not be
2 disabling, drug or alcohol addiction is a contributing factor material to the
3 determination of disability. *Id.* If the remaining limitations would be disabling,
4 the claimant is disabled independent of the drug or alcohol addiction and the
5 addiction is not a contributing factor material to disability. *Id.* Plaintiff has the
6 burden of showing that drug and alcohol addiction is not a contributing factor
7 material to disability. *Parra*, 481 F.3d at 748.

8 **ALJ'S FINDINGS**

9 On July 29, 2013, Plaintiff protectively filed applications for Title II
10 disability insurance benefits and Title XVI supplemental security income benefits,
11 alleging an amended onset date of June 1, 2013. Tr. 77, 253-65. The applications
12 were denied initially, Tr. 179-82, and on reconsideration, Tr. 187-90. Plaintiff
13 appeared at hearings before an administrative law judge (ALJ) on November 23,
14 2015, Tr. 53-70, and on March 21, 2016, Tr. 71-116. On May 3, 2016, the ALJ
15 denied Plaintiff's claim.

16 At step one of the sequential evaluation process, the ALJ found Plaintiff has
17 not engaged in substantial gainful activity since June 1, 2013. Tr. 23. At step two,
18 the ALJ found Plaintiff has the following severe impairments: schizoaffective
19 disorder, psychosis NOS, post-traumatic stress disorder, depressive disorder,
20 borderline personality disorder, polysubstance abuse/dependence, obesity, cervical

1 and lumbar degenerative disc disease, and degenerative joint disease – right knee.

2 *Id.* At step three, the ALJ found Plaintiff's impairments, including the substance

3 use disorders, meet sections 12.03, 12.04, 12.06, 12.08, and 12.09 of 20 C.F.R.

4 Part 404, Subpart P, Appendix 1. Tr. 24. However, the ALJ found that if Plaintiff

5 stopped the substance use, she would not have an impairment or combination of

6 impairments that meets or medically equals any of the impairments listed in 20

7 C.F.R. Part 404, Subpart P, Appendix 1. Tr. 28. The ALJ then concluded that if

8 Plaintiff stopped the substance use, Plaintiff would have the RFC to perform light

9 work with the following limitations:

10 [S]he could sit up to six hours in an eight-hour day; she could stand and/or
11 walk up [to] one hour at a time and six hours total in an eight-hour day; she
12 could occasionally stoop, kneel, crouch, crawl, and climb ramps or stairs,
13 but she could never climb ladders, ropes, or scaffolds; she should avoid
14 concentrated exposure to extreme cold; she would be limited to simple,
15 repetitive tasks of up to three steps; she would be limited to ordinary
16 production requirements; she could tolerate brief, superficial contact with
17 the public and occasional non-collaborative contact with coworkers.

14 Tr. 31-32.

15 At step four, the ALJ found that if Plaintiff stopped the substance use,
16 Plaintiff would be able to perform past relevant work as a housekeeper. Tr. 40.

17 Alternatively, at step five, the ALJ found that if Plaintiff stopped the substance use,
18 there are jobs that exist in significant numbers in the national economy that

19 Plaintiff could perform, such as photocopy machine operator and mail clerk. Tr.

20 41. The ALJ concluded that because substance use disorder is a contributing factor

1 material to the determination of disability, Plaintiff was not under a disability, as
2 defined in the Social Security Act, from June 1, 2013, through May 3, 2016, the
3 date of the ALJ's decision. Tr. 42.

4 On June 28, 2017, the Appeals Council denied review of the ALJ's decision,
5 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
6 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

7 ISSUES

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 her disability insurance benefits under Title II and supplemental security income
10 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
11 issues for review:

- 12 1. Whether the ALJ properly determined that substance use disorder is a
13 contributing factor material to the determination of disability;
- 14 2. Whether the ALJ properly evaluated the medical opinion evidence; and
- 15 3. Whether the ALJ properly evaluated the lay testimony.

16 ECF No. 21 at 2, 17.

17 DISCUSSION

18 A. Substantial Evidence of DAA

19 Plaintiff challenges the ALJ's finding that Plaintiff's substance abuse
20 contributed materially to her limitations. ECF No. 21 at 5-12. Plaintiff alleged

1 that she ceased substance abuse in June 2013, her amended alleged disability onset
2 date, but that her mental symptoms remained disabling. ECF No. 21 at 10.
3 Therefore, Plaintiff contends the ALJ erred by finding that, when she was not using
4 substances, she retained the RFC to perform a light range of work with additional
5 limitations.

6 As an initial matter, Plaintiff faults the ALJ for concluding that Plaintiff
7 abused drugs or alcohol during the relevant period. ECF No. 21 at 9-12. Social
8 Security claimants may not receive benefits where DAA is a material contributing
9 factor to disability. *See* 20 C.F.R. §§ 404.1535(b), 416.935(b); 42 U.S.C. §
10 423(d)(2)(c). DAA is a materially contributing factor if the claimant would not
11 meet the SSA's definition of disability if the claimant were not using drugs or
12 alcohol. 20 C.F.R. §§ 404.1535(b), 416.935(b). Plaintiff has the burden of
13 showing that drug and alcohol addiction is not a contributing factor material to
14 disability. *Parra*, 481 F.3d at 748. Here, the ALJ found that despite Plaintiff's
15 allegation that she remained sober after June 1, 2013, the record showed she did
16 not remain abstinent during the relevant period in this case. Tr. 23. The ALJ
17 relied on this evidence of Plaintiff's substance abuse in evaluating Plaintiff's
18 subjective symptom complaints, the medical opinion evidence, and the lay opinion
19 evidence. Tr. 23-24, 34-36. Additionally, several medical sources opined that

1 Plaintiff's substance abuse contributed to Plaintiff's impairments. *See* Tr. 78-80,
2 554, 653.

3 Plaintiff asserts there is no evidence in the record to show that Plaintiff
4 abused substances during the relevant period in this case. ECF No. 21 at 9.
5 However, the record as a whole provides substantial evidence to support the ALJ's
6 finding. During a July 10, 2013, medical appointment, Plaintiff reported that her
7 last use of controlled substances was approximately one week prior. Tr. 492. On
8 August 16, 2013, Plaintiff reported she had been clean for six days. Tr. 526. On
9 April 29, 2014, Dr. Islam-Zwart opined that Plaintiff's psychotic symptoms were
10 likely a result of Plaintiff's methamphetamine addiction. Tr. 653. On August 8,
11 2014, Plaintiff reported that she had been sober for 14 months, which the provider
12 noted was inconsistent with treatment notes showing ongoing abuse of pain and
13 anxiety medications, including consuming one month's worth of Hydroxyzine in
14 three days. Tr. 861. Plaintiff also reported that she had been abusing her pain and
15 anxiety medications for several months prior to her August 2014 involuntary
16 psychiatric hospitalization. *Id.* During a November 19, 2014, assessment at
17 Eastern State Hospital, Plaintiff indicated current substance abuse and stated that
18 her drug usage had been consistent over the years with no extended periods of
19 being clean and sober. Tr. 663. Plaintiff was discharged from Eastern State
20 Hospital to a detoxification program. Tr. 655. On January 28, 2015, Dr. Mulvihill

1 noted that Plaintiff's discharge paperwork from Eastern State Hospital indicated
2 that Plaintiff had used methamphetamine "for an unknown period of time prior to
3 the detention." Tr. 909. During the same visit, Plaintiff reported to Dr. Mulvihill
4 that she was a "garbage can user," meaning she would use any substance available
5 to her. *Id.* Dr. Mulvihill suspected Plaintiff was intoxicated during an examination
6 on the same day and suggested Plaintiff attend 90 days of court ordered inpatient
7 treatment. Tr. 913. Based on this record, the ALJ reasonably concluded that
8 Plaintiff "did not maintain abstinence from substances for the entire period relevant
9 to this decision." Tr. 23.

10 Plaintiff argues that other evidence in the record undermines the ALJ's
11 conclusion. ECF No. 21 at 10-12. However, even where evidence is subject to
12 more than one rational interpretation, the ALJ's conclusion will be upheld. *Burch*
13 *v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The Court will only disturb the
14 ALJ's findings if they are not supported by substantial evidence. *Hill*, 698 F.3d at
15 1158. Here, the record contains substantial evidence to indicate Plaintiff's
16 substance abuse was ongoing during the relevant period in this case, so the Court
17 defers to the ALJ's interpretation of the record.

18 Plaintiff argues the ALJ's conclusion is not supported because Plaintiff
19 testified that she had been sober since June 1, 2013. ECF No. 21 at 9; *see* Tr. 98.
20 However, the ALJ discredited Plaintiff's subjective reporting because the

1 “objective medical evidence [did] not fully support the level of limitation
2 claimed.” Tr. 33. Plaintiff fails to challenge the ALJ’s evaluation of Plaintiff’s
3 subjective reporting, ECF No. 21 at 4-18, thus any challenge is waived. *See*
4 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)
5 (determining Court may decline to address on the merits issues not argued with
6 specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may not
7 consider on appeal issues not “specifically and distinctly argued” in the party’s
8 opening brief). Plaintiff’s discredited subjective reporting does not undermine the
9 substantial medical evidence supporting the ALJ’s conclusion.

10 Finally, Plaintiff argues that the ALJ erred in rejecting the lay testimony of
11 Plaintiff’s sponsor, Lea Anne Potter. ECF No. 21 at 9. Ms. Potter declared on
12 February 29, 2016, that Plaintiff had been sober for two and a half years. Tr. 356.
13 However, the ALJ gave this opinion no weight, in part because it was inconsistent
14 with the objective evidence. Tr. 40. As discussed *infra*, the ALJ provided several
15 germane reasons to discredit Ms. Potter’s opinion. Accordingly, Ms. Potter’s
16 discredited report does not undermine the substantial medical evidence supporting
17 the ALJ’s conclusion.

18 Overall, the ALJ reasonably concluded that Plaintiff “did not remain
19 abstinent during the entire period relevant to this decision.” Tr. 23. This finding is
20 supported by substantial evidence.

1 **B. Medical Opinion Evidence**

2 Plaintiff challenges the ALJ’s consideration of the medical opinions of
3 William Phillips, M.D.; Kayleen Islam-Zwart, Ph.D.; Debra Brown, Ph.D.; Dana
4 Harmon, Ph.D.; Nancy Winfrey, Ph.D. ECF No. 21 at 12-16.

5 There are three types of physicians: “(1) those who treat the claimant
6 (treating physicians); (2) those who examine but do not treat the claimant
7 (examining physicians); and (3) those who neither examine nor treat the claimant
8 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
9 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
10 Generally, a treating physician’s opinion carries more weight than an examining
11 physician’s, and an examining physician’s opinion carries more weight than a
12 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
13 to opinions that are explained than to those that are not, and to the opinions of
14 specialists concerning matters relating to their specialty over that of
15 nonspecialists.” *Id.* (citations omitted).

16 If a treating or examining physician’s opinion is uncontradicted, the ALJ
17 may reject it only by offering “clear and convincing reasons that are supported by
18 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
19 “However, the ALJ need not accept the opinion of any physician, including a
20 treating physician, if that opinion is brief, conclusory and inadequately supported

1 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
2 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
3 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
4 may only reject it by providing specific and legitimate reasons that are supported
5 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
6 F.3d 821, 830-831 (9th Cir. 1995)).

7 *1. Dr. Phillips*

8 Dr. Phillips, Plaintiff’s treating physician, opined on October 19, 2015, that
9 Plaintiff had marked limitations in her ability to remember locations and work-like
10 procedures; her ability to understand and remember very short and simple
11 instructions; her ability to understand and remember detailed instructions; her
12 ability to carry out very short and simple instructions; her ability to carry out
13 detailed instructions; her ability to maintain attention and concentration for
14 extended periods; her ability to interact appropriately with the general public; her
15 ability to ask simple questions or request assistance; her ability to accept
16 instructions and respond appropriately to criticism from supervisors; her ability to
17 get along with coworkers or peers without distracting them or exhibiting
18 behavioral extremes; her ability to maintain socially appropriate behavior and to
19 adhere to basic standards of neatness and cleanliness; her ability to respond
20 appropriately to changes in the work setting; and her ability to be aware of normal

1 hazards and to take appropriate precautions; and severe limitations in her ability to
2 perform activities within a schedule, maintain regular attendance, and be punctual
3 within customary tolerances; her ability to sustain an ordinary routine without
4 special supervision; her ability to work in coordination with or proximity to others
5 without being distracted by them; her ability to make simple work related
6 decisions; her ability to travel in unfamiliar places or use public transportation; and
7 her ability to set realistic goals or make plans independently of others. Tr. 938-40.
8 The ALJ gave this opinion no weight. Tr. 36. Because Dr. Phillips' opinion was
9 contradicted by Dr. Fligstein, Tr. 127-28, Dr. Robinson, Tr. 157-59, and Dr.
10 Winfrey, Tr. 90-92, the ALJ was required to provide specific and legitimate
11 reasons for rejecting the opinion. *Bayliss*, 427 F.3d at 1216.

12 First, the ALJ found Dr. Phillips' opinion was not supported by the medical
13 evidence. Tr. 36. A medical opinion may be rejected if it is unsupported by
14 medical findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of Soc. Sec. Admin.*,
15 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th
16 Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Matney v.*
17 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir.1992). Furthermore, a physician's opinion
18 may be rejected if it is unsupported by the physician's treatment notes. *See*
19 *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). Here, the ALJ observed
20 that Dr. Phillips' opined marked and severe limitations were inconsistent with the

1 medical evidence, including Dr. Phillips' own treatment notes, which generally
2 showed stability with medication. Tr. 35-36; *see* Tr. 670 (Plaintiff reported on
3 January 9, 2014 that she was stable on her current medication); Tr. 685 (Plaintiff
4 reported on March 21, 2014 that she was feeling better with medication); Tr. 708
5 (Plaintiff reported on June 18, 2014 that she was happy with her current
6 medication regimen); Tr. 708 (Plaintiff reported on July 30, 2014 that she
7 experienced improvement in her paranoid ideation); Tr. 795 (Plaintiff observed on
8 August 18, 2014 to be pleasant, cooperative, and social when compliant with
9 medication regime); Tr. 714 (Plaintiff reported on August 29, 2014 that she was
10 feeling much better after her involuntary stabilization treatment and that her
11 psychotropic medications were working well for her); Tr. 788 (Plaintiff reported
12 on October 3, 2014 that she auditory hallucinations improved with medication); Tr.
13 751 (Plaintiff reported on March 24, 2015 that her mental health symptoms were
14 stable); Tr. 897 (Plaintiff observed on May 21, 2015 to be much calmer than on
15 previous visits and reported that she was doing well); Tr. 766 (Plaintiff reported on
16 July 14, 2015 that her mental health symptoms were stable). Additionally, the ALJ
17 acknowledged that Plaintiff decompensated several times during the relevant
18 period, but that the decompensation occurred at times when Plaintiff reported
19 substance abuse. Tr. 35-36; *see* Tr. 861 (Plaintiff reported abusing pain and
20 anxiety medications for several months prior to her August 2014 involuntary

1 psychiatric hospitalization); Tr. 663 (Plaintiff reported current drug use upon her
2 November 2014 admission to Eastern State Hospital). The ALJ reasonably
3 concluded, based on this record, that Dr. Phillips' opined limitations were
4 inconsistent with the overall record, which showed stability with medication
5 compliance and did not contain evidence unrelated to substance abuse to support
6 Dr. Phillips' opined limitations. Tr. 36. This was a specific and legitimate reason
7 to discredit Dr. Phillips' opinion.

8 Second, the ALJ found Dr. Phillips' opinion was not explained. Tr. 36. The
9 Social Security regulations "give more weight to opinions that are explained than
10 to those that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the
11 opinion of any physician, including a treating physician, if that opinion is brief,
12 conclusory and inadequately supported by clinical findings." *Bray*, 554 at 1228.
13 Dr. Phillips' opinion contains no explanation for the limitations he opined. Tr.
14 938-40. In light of the inconsistencies between Dr. Phillips' opinion and the record
15 as whole, discussed *supra*, the fact that Dr. Phillips' opinion was not explained
16 provided specific and legitimate reason for the ALJ to discredit Dr. Phillips'
17 opinion.

18 Third, the ALJ found Dr. Phillips' opinion was entitled to less weight
19 because it concerned an area outside his area of expertise. Tr. 36. A medical
20 provider's specialization is a relevant consideration in weighing medical opinion

evidence. 20 C.F.R. §§ 404.1527(c)(5), 416.927(c)(5). Dr. Phillips is Plaintiff's primary care provider and the record does not show that he has specialized expertise in psychiatry. *See* Tr. 667. The ALJ rejected Dr. Phillips' opinion limitations in favor of the opinions in favor of Dr. Winfrey, a reviewing psychological expert. Tr. 37; *see* Tr. 941-43. The ALJ reasonably concluded that the medical source with psychological expertise was entitled to more weight than Dr. Phillips in rendering opinions on Plaintiff's mental impairments. Tr. 36. This was a specific and legitimate reason to give less weight to Dr. Phillips' opinion.

2. Dr. Islam-Zwart – 2014

Dr. Islam-Zwart examined Plaintiff on April 29, 2014, and opined Plaintiff had moderate impairments in her ability to understand, remember, and persist in tasks by following very short and simple instructions; her ability to learn new tasks; her ability to make simple work-related decisions; her ability to be aware of normal hazards and take appropriate precautions; her ability to ask simple questions or request assistance; and her ability to set realistic goals and plan independently; that Plaintiff had marked impairments in her ability to understand, remember, and persist in tasks by following detailed instructions; her ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances without special supervision; her ability to adapt to changes in a routine work setting; her ability to complete a normal work day and

1 work week without interruptions from psychologically based symptoms; that
2 Plaintiff had severe impairments in her ability to communicate and perform
3 effectively in a work setting and her ability to maintain appropriate behavior in a
4 work setting; and that Plaintiff's impairments were not primarily the result of drug
5 or alcohol use in the last 60 days. Tr. 647. The ALJ gave this opinion little
6 weight. Tr. 35. Because Dr. Islam-Zwart's opinions were contradicted by Dr.
7 Fligstein, Tr. 127-28, Dr. Robinson, Tr. 157-59, and Dr. Winfrey, Tr. 84-85, the
8 ALJ was required to provide specific and legitimate reasons for rejecting the
9 opinion. *Bayliss*, 427 F.3d at 1216.

10 First, the ALJ found this opinion was inconsistent with other medical
11 evidence in the record. Tr. 35. Relevant factors to evaluating any medical opinion
12 include the amount of relevant evidence that supports the opinion, the quality of
13 the explanation provided in the opinion, and the consistency of the medical opinion
14 with the record as a whole. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir.
15 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Here, the ALJ
16 specifically found that Plaintiff's presentation and test performance during Dr.
17 Islam-Zwart's 2014 examination were inconsistent with both prior and subsequent
18 examinations. Tr. 35. For example, Plaintiff recalled zero of three items on the
19 short-delay memory task, but was able to recall three of three items on the same
20 test during Dr. Islam-Zwart's 2016 evaluation. *Compare* Tr. 652 *with* Tr. 957.

1 Although Plaintiff self-discontinued the Trails A test with Dr. Islam-Zwart in 2014,
2 Plaintiff successfully completed the Trail Making Test at other times. Tr. 652-53;
3 *see* Tr. 556 (Plaintiff's Trail Making Tests fell within normal range in August
4 2013); Tr. 957 (Plaintiff's Trails A test was within normal limits and Trails B test
5 fell in the moderately impaired range in March 2016). The ALJ also observed that
6 Plaintiff reported frequent panic attacks to Dr. Islam-Zwart, but did not report
7 these symptoms to her treating providers. Tr. 650; *see* Tr. 532-40, 594-611, 665-
8 738. The ALJ reasonably concluded, based on this record, that Dr. Islam-Zwart's
9 opinion was inconsistent with other medical evidence in the record. This was a
10 specific and legitimate reason to discredit Dr. Islam-Zwart's opinion.

11 Second, the ALJ found this opinion was based on Plaintiff's self-reports,
12 which the ALJ found were not credible. Tr. 35. A physician's opinion may be
13 rejected if it based on a claimant's subjective complaints which were properly
14 discounted. *Tonapetyan*, 242 F.3d at 1149; *Morgan v. Comm'r of Soc. Sec. Admin.*,
15 169 F.3d 595, 602 (9th Cir. 1999); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir.
16 1989). "[W]hen an opinion is not more heavily based on a patient's self-reports
17 than on clinical observations, [this] is no evidentiary basis for rejecting the
18 opinion." *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Based on the
19 inconsistencies identified *supra* between Plaintiff's presentation to Dr. Islam-Zwart
20 in 2014 and the other medical evidence in the record, the ALJ reasonably

1 concluded that Plaintiff's reporting to Dr. Islam-Zwart in 2014 was not credible.
2 Tr. 35. This was a specific and legitimate reason to discredit Dr. Islam-Zwart's
3 opinion.

4 Third, the ALJ found that this opinion was based on test results where
5 Plaintiff did not give a full effort in testing. Tr. 35. Evidence that a claimant
6 exaggerated her symptoms is a clear and convincing reason to reject the doctor's
7 conclusions. *Thomas*, 278 F.3d at 958. As discussed *supra*, Plaintiff's objective
8 mental testing results during Dr. Islam-Zwart's 2014 examination were
9 inconsistent with her performance on other mental examinations in the record. Dr.
10 Winfrey testified that these results indicated Plaintiff was not giving full effort and
11 was not telling the truth during Dr. Islam-Zwart's examination. Tr. 81. The ALJ
12 reasonably concluded that Dr. Islam-Zwart's opinion was entitled to less weight
13 because it was based on Plaintiff's exaggerated symptoms. Tr. 35. This was a
14 specific and legitimate reason to discredit Dr. Islam-Zwart's opinion.

15 Fourth, the ALJ found the opinion was based on DSHS standards rather than
16 Social Security Administration standards. Tr. 35. The regulations provide that the
17 amount of an acceptable source's knowledge of Social Security disability programs
18 and their evidentiary requirements may be considered in evaluating an opinion,
19 regardless of the source of that understanding. 20 C.F.R. §§ 404.1527(c),
20 416.927(c). Although state agency disability rules may differ from Social Security

1 Administration rules regarding disability, it is not always apparent that the
2 differences in rules affect a particular physician's report without further analysis by
3 the ALJ. Here, the ALJ failed to identify any relevant and specific definitions used
4 in the evaluations that are different from those relevant to the SSA disability
5 determination. Tr. 35. Accordingly, this was not a specific and legitimate reason
6 to discredit Dr. Islam-Zwart's opinion. However, such error is harmless because
7 the ALJ provided other specific and legitimate reasons, supported by substantial
8 evidence, to discredit Dr. Islam-Zwart's opinion. *Molina*, 674 F.3d at 1115.

9 *3. Dr. Islam-Zwart – 2016*

10 Dr. Islam-Zwart examined Plaintiff again on March 14, 2016, and opined
11 Plaintiff had moderate impairments in her ability to understand, remember, and
12 persist in tasks by following very short and simple instructions; her ability to learn
13 new tasks; her ability to perform routine tasks without special supervision; her
14 ability to make simple work-related decisions; her ability to be aware of normal
15 hazards and take appropriate precautions; her ability to ask simple questions or
16 request assistance; and her ability to set realistic goals and plan independently; that
17 Plaintiff had marked impairments in her ability to understand, remember, and
18 persist in tasks by following detailed instructions; her ability to perform activities
19 within a schedule, maintain regular attendance, and be punctual within customary
20 tolerances without special supervision; her ability to adapt to routine changes in a

1 work setting; her ability to communicate and perform effectively in a work setting;
2 that Plaintiff have severe limitations in her ability to complete a normal work day
3 and work week without interruptions from psychologically based symptoms; that
4 the combined impact of Plaintiff's mental impairments caused marked limitations
5 in her ability to perform basic work activities; and that her impairments were not
6 primarily the result of drug or alcohol use in the last 60 days. Tr. 952. The ALJ
7 gave this opinion little to no weight. Tr. 37. Because Dr. Islam-Zwart's opinions
8 were contradicted by Dr. Fligstein, Tr. 127-28, Dr. Robinson, Tr. 157-59, and Dr.
9 Winfrey, Tr. 84-85, the ALJ was required to provide specific and legitimate
10 reasons for rejecting the opinion. *Bayliss*, 427 F.3d at 1216.

11 First, the ALJ found this opinion was not supported by the medical evidence.
12 Tr. 37. A medical opinion may be rejected if it is unsupported by medical
13 findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at 1195; *Thomas*, 278 F.3d at
14 957; *Tonapetyan*, 242 F.3d at 1149; *Matney*, 981 F.2d at 1019. Furthermore, a
15 physician's opinion may be rejected if it is unsupported by the physician's
16 treatment notes. *See Connett*, 340 F.3d at 875. Here, the ALJ observed that Dr.
17 Islam-Zwart's examination findings showed mental control within normal limits,
18 Trails A within normal limits, Trails B showing moderate impairment, and no
19 malingered of memory problems. Tr. 957. Dr. Islam-Zwart also observed that
20 Plaintiff's psychotic symptoms and depression were under control with

1 medication. *Id.* The ALJ reasonably concluded that these examination results
2 were inconsistent with the moderate, marked, and severe limitations Dr. Islam-
3 Zwart opined. Tr. 37. This was a specific and legitimate reason to discredit Dr.
4 Islam-Zwart's opinion.

5 Second, the ALJ found this opinion was inconsistent with Plaintiff's record
6 of improvement with medication. Tr. 37. An ALJ may discredit physicians'
7 opinions that are unsupported by the record as a whole. *Batson*, 359 F.3d at 1195.
8 The record as a whole shows that Plaintiff's condition showed improvement when
9 she was compliant with medications and not abusing drugs. *See* Tr. 670 (Plaintiff
10 reported on January 9, 2014 that she was stable on her current medication); Tr. 685
11 (Plaintiff reported on March 21, 2014 that she was feeling better with medication);
12 Tr. 708 (Plaintiff reported on June 18, 2014 that she was happy with her current
13 medication regimen); Tr. 708 (Plaintiff reported on July 30, 2014 that she
14 experienced improvement in her paranoid ideation); Tr. 795 (Plaintiff observed on
15 August 18, 2014 to be pleasant, cooperative, and social when compliant with
16 medication regime); Tr. 714 (Plaintiff reported on August 29, 2014 that she was
17 feeling much better after her involuntary stabilization treatment and that her
18 psychotropic medications were working well for her); Tr. 788 (Plaintiff reported
19 on October 3, 2014 that she auditory hallucinations improved with medication); Tr.
20 751 (Plaintiff reported on March 24, 2015 that her mental health symptoms were

1 stable); Tr. 897 (Plaintiff observed on May 21, 2015 to be much calmer than on
2 previous visits and reported that she was doing well); Tr. 766 (Plaintiff reported on
3 July 14, 2015 that her mental health symptoms were stable); *see also* Tr. 861
4 (Plaintiff reported abusing pain and anxiety medications for several months prior to
5 her August 2014 involuntary psychiatric hospitalization); Tr. 663 (Plaintiff
6 reported current drug use upon her November 2014 admission to Eastern State
7 Hospital). The ALJ reasonably concluded that Plaintiff's record of improvement
8 when compliant with recommended treatment was inconsistent with the moderate,
9 marked, and severe limitations Dr. Islam-Zwart opined. Tr. 37. This was a
10 specific and legitimate reason to discredit Dr. Islam-Zwart's opinion.

11 Third, the ALJ found this opinion was entitled to less weight because Dr.
12 Islam-Zwart did not review other evidence in the record. Tr. 37. The extent to
13 which a medical source is "familiar with the other information in [the claimant's]
14 case record" is relevant in assessing the weight of that source's medical opinion.
15 *See* 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6). Here, the ALJ observed that Dr.
16 Islam-Zwart only reviewed her previous evaluation of Plaintiff. Tr. 37, 950. The
17 ALJ discredited Dr. Islam-Zwart's opinion in favor of Dr. Fligstein and Dr.
18 Robinson, who reviewed the evidence of record as of the time of their review, and
19 Dr. Winfrey, who reviewed the entire record. Tr. 37, 75, 120-22, 148-52. That Dr.
20 Islam-Zwart did not review the longitudinal record provided specific and

1 legitimate reason for the ALJ to discredit her opinion in favor of other medical
2 sources.

3 Fourth, the ALJ found these opinions were entitled to less weight because
4 they were evaluated under different standards than Social Security regulations. Tr.
5 37. The regulations provide that the amount of an acceptable source's knowledge
6 of Social Security disability programs and their evidentiary requirements may be
7 considered in evaluating an opinion, regardless of the source of that understanding.
8 20 C.F.R. §§ 404.1527(c), 416.927(c). As discussed *supra*, although state agency
9 disability rules may differ from Social Security Administration rules regarding
10 disability, it is not always apparent that the differences in rules affect a particular
11 physician's report without further analysis by the ALJ. Here, the ALJ failed to
12 identify any relevant and specific definitions used in the evaluations that are
13 different from those relevant to the SSA disability determination. Tr. 35.
14 Accordingly, this was not a specific and legitimate reason to discredit Dr. Islam-
15 Zwart's opinion. However, such error is harmless because the ALJ provided
16 several other specific and legitimate reasons, supported by substantial evidence, to
17 discredit Dr. Islam-Zwart's opinion. *Molina*, 674 F.3d at 1115.

18 4. *Dr. Brown and Dr. Harmon*

19 On August 27, 2013, Dr. Brown examined Plaintiff and opined Plaintiff had
20 moderate impairments in her ability to perform work activities within a schedule,

1 maintain regular attendance and be punctual within customary tolerances; her
2 ability to learn new tasks; her ability to perform routine tasks without special
3 supervision; her ability to make simple work-related decisions; her ability to ask
4 simple questions or request assistance; that Plaintiff had marked impairments in
5 her ability to be aware of normal hazards and take appropriate precautions;
6 communicate and perform effectively in a work setting; maintain appropriate
7 behavior in a work setting; complete a normal workday and work week without
8 interruptions from psychologically based symptoms; her ability to set realistic
9 goals and plan independently; and severe limitations in her ability to adapt to
10 changes in a routine work setting. Tr. 553-54. On September 17, 2013, Dr.
11 Harmon reviewed Dr. Brown's report and opined the same functional limitations.
12 Tr. 547. The ALJ gave these opinions little to no weight. Tr. 34. Because Dr.
13 Brown and Dr. Harmon's opinions were contradicted by Dr. Fligstein, Tr. 127-28,
14 Dr. Robinson, Tr. 157-59, and Dr. Winfrey, Tr. 84-85, the ALJ was required to
15 provide specific and legitimate reasons for rejecting the opinion. *Bayliss*, 427 F.3d
16 at 1216.

17 First, the ALJ found these opinions were based on suspect examination
18 results. Tr. 34. A medical opinion may be rejected if it is unsupported by medical
19 findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at 1195; *Thomas*, 278 F.3d at
20 957; *Tonapetyan*, 242 F.3d at 1149; *Matney*, 981 F.2d at 1019. Furthermore,

1 evidence that a claimant exaggerated her symptoms is a clear and convincing
2 reason to reject the doctor's conclusions. *Thomas*, 278 F.3d at 958. Here, the ALJ
3 observed Plaintiff's PAI profile was invalid due to over reporting. Tr. 34, 556.
4 The ALJ also observed that Dr. Brown's testing showed Plaintiff's memory fell
5 between the 0.5 to 4th percentile. Tr. 34, 557. However, during an appointment
6 with her treating only four days prior to this examination, Plaintiff was observed to
7 have normal memory. Tr. 534. Similarly, Plaintiff reported to Dr. Brown that she
8 experienced panic attacks once or twice per week, but had not reported these
9 symptoms to her primary care provider during the same appointment four days
10 prior. *Compare* Tr. 552 with Tr. 532-37. The ALJ reasonably concluded that the
11 examination results Dr. Brown and Dr. Harmon based their opinions on were
12 suspect. Tr. 34. This was a specific and legitimate reason to discredit these
13 opinions.

14 Second, the ALJ found these opinions were based on Plaintiff's functioning
15 while under the effects of substance abuse. Tr. 34. In conducting a DAA analysis,
16 the "key factor" for the ALJ to consider is whether the claimant would still be
17 disabled if the claimant stopped using drugs or alcohol. 20 C.F.R. §§
18 404.1535(b)(2), 416.935(b)(2). Therefore, the fact that a medical report reflects a
19 claimant's functioning while using drugs or alcohol is a valid consideration to
20 make in evaluating a medical opinion. *See Chavez v. Colvin*, No. 3:14-cv-01178-

1 JE, 2016 WL 8731796, at *8 (D. Or. July 25, 2016). Here, Dr. Brown opined
2 Plaintiff's impairments were primarily the result of alcohol or drug use in the last
3 60 days and observed that Plaintiff's "years of opioid dependence is her primary
4 problem[] as she recovers... It is likely her IQ and memory scores are lower than
5 they would be if she was retested after 6-12 months of sobriety." Tr. 554. The
6 record shows Plaintiff self-reported drug use 20 days before Dr. Brown's
7 examination. Tr. 526. The ALJ reasonably concluded that the opinions of Dr.
8 Brown and Dr. Harmon were entitled to less weight because they reflected
9 Plaintiff's functioning while under the effects of substance abuse. Tr. 34. This
10 was a specific and legitimate reason to discredit these opinions.

11 Third, the ALJ found these opinions were based on DSHS regulations rather
12 than Social Security Act regulations. Tr. 34. The regulations provide that the
13 amount of an acceptable source's knowledge of Social Security disability programs
14 and their evidentiary requirements may be considered in evaluating an opinion,
15 regardless of the source of that understanding. 20 C.F.R. §§ 404.1527(c),
16 416.927(c). Although state agency disability rules may differ from Social Security
17 Administration rules regarding disability, it is not always apparent that the
18 differences in rules affect a particular physician's report without further analysis by
19 the ALJ. Here, the ALJ failed to identify any relevant and specific definitions used
20 in the evaluations that are different from those relevant to the SSA disability

determination. Tr. 35. Accordingly, this was not a specific and legitimate reason to discredit these opinions. However, such error is harmless because the ALJ provided several other specific and legitimate reasons, supported by substantial evidence, to discredit these opinions. *Molina*, 674 F.3d at 1115.

5. *Dr. Winfrey*

Dr. Winfrey reviewed the record as whole and testified at the hearing that when Plaintiff was not abusing drugs or alcohol, Plaintiff's impairments would cause mild limitations in daily activities, moderate impairments in social functioning, moderate impairments in concentration, persistence, and pace, and no episodes of decompensation; that Plaintiff would need a job where she did not rely on other and others did not rely on her; that Plaintiff should avoid crowds; and that Plaintiff should be limited to simpler tasks due to occasional auditory hallucinations. Tr. 77-79, 84-85. The ALJ gave this opinion great weight. Tr. 37. Although an ALJ must provide specific and legitimate reasons to reject contradicted medical opinion evidence, the same standard does not apply when the ALJ credits opinion evidence. *See Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995); *Bayliss*, 427 F.3d at 1216. Furthermore, the opinion of a non-examining expert "may constitute substantial evidence when it is consistent with other independent evidence in the record." *Tonapetyan*, 242 F.3d at 1149.

1 Although not required to provide specific and legitimate reasons to credit a
2 medical opinion, here the ALJ listed several reasons for crediting Dr. Winfrey's
3 opinion. First, the ALJ found Dr. Winfrey's opinion was consistent with the
4 longitudinal record. Tr. 37. Relevant factors to evaluating any medical opinion
5 include the amount of relevant evidence that supports the opinion, the quality of
6 the explanation provided in the opinion, and the consistency of the medical opinion
7 with the record as a whole. *Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631.
8 An ALJ may choose to give more weight to an opinion that is more consistent with
9 the evidence in the record. 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4) ("the more
10 consistent an opinion is with the record as a whole, the more weight we will give to
11 that opinion"). As discussed *supra*, the record as a whole shows Plaintiff showed
12 improvement in her symptoms when she was compliant with medications and not
13 abusing drugs or alcohol. See Tr. 670 (Plaintiff reported on January 9, 2014 that
14 she was stable on her current medication); Tr. 685 (Plaintiff reported on March 21,
15 2014 that she was feeling better with medication); Tr. 708 (Plaintiff reported on
16 June 18, 2014 that she was happy with her current medication regimen); Tr. 708
17 (Plaintiff reported on July 30, 2014 that she experienced improvement in her
18 paranoid ideation); Tr. 795 (Plaintiff observed on August 18, 2014 to be pleasant,
19 cooperative, and social when compliant with medication regime); Tr. 714 (Plaintiff
20 reported on August 29, 2014 that she was feeling much better after her involuntary

1 stabilization treatment and that her psychotropic medications were working well
2 for her); Tr. 788 (Plaintiff reported on October 3, 2014 that she auditory
3 hallucinations improved with medication); Tr. 751 (Plaintiff reported on March 24,
4 2015 that her mental health symptoms were stable); Tr. 897 (Plaintiff observed on
5 May 21, 2015 to be much calmer than on previous visits and reported that she was
6 doing well); Tr. 766 (Plaintiff reported on July 14, 2015 that her mental health
7 symptoms were stable); *see also* Tr. 861 (Plaintiff reported abusing pain and
8 anxiety medications for several months prior to her August 2014 involuntary
9 psychiatric hospitalization); Tr. 663 (Plaintiff reported current drug use upon her
10 November 2014 admission to Eastern State Hospital). The ALJ reasonably
11 concluded that Dr. Winfrey's opinion was consistent with Plaintiff's record of
12 improvement. Tr. 37.

13 Second, the ALJ found Dr. Winfrey's opinion was entitled to more weight
14 because she reviewed the record as a whole. Tr. 37. The extent to which a
15 medical source is "familiar with the other information in [the claimant's] case
16 record" is relevant in assessing the weight of that source's medical opinion. *See* 20
17 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6). Dr. Winfrey testified that she reviewed
18 the record as a whole. Tr. 75. The ALJ properly considered Dr. Winfrey's
19 familiarity with the longitudinal record in assigning her opinion great weight.
20

1 Third, the ALJ found Dr. Winfrey's opinion was entitled to more weight
2 because of her specialized expertise. Tr. 37. A medical provider's specialization
3 is a relevant consideration in weighing medical opinion evidence. 20 C.F.R. §§
4 404.1527(c)(5), 416.927(c)(5). Dr. Winfrey is a licensed clinical psychologist. Tr.
5 75, 941. The ALJ reasonably considered Dr. Winfrey's psychology specialty in
6 evaluating Dr. Winfrey's assessment of Plaintiff's mental impairments.

7 Fourth, the ALJ found Dr. Winfrey's opinion was entitled to more weight
8 because of her familiarity with Social Security regulations. Tr. 37. The ALJ may
9 consider a medical provider's familiarity with "disability programs and their
10 evidentiary requirements" when evaluating a medical opinion. *Orn*, 495 F.3d at
11 631. Dr. Winfrey was called as a medical expert for the administrative hearing.
12 Tr. 73. The ALJ reasonably considered Dr. Winfrey's familiarity with Social
13 Security regulations in crediting her opinion.

14 **C. Lay Testimony**

15 Plaintiff faults the ALJ for giving no weight to the opinion of Plaintiff's
16 sponsor, Lea Anne Potter. ECF No. 21 at 17. On February 29, 2016, Ms. Potter
17 opined Plaintiff was unable to work. Tr. 356-57. Ms. Potter is not a medical
18 professional and is therefore a lay witness. *Id.* An ALJ must consider the
19 testimony of lay witnesses in determining whether a claimant is disabled. *Stout v.*
20 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). Lay witness

1 testimony cannot establish the existence of medically determinable impairments,
2 but lay witness testimony is “competent evidence” as to “how an impairment
3 affects [a claimant's] ability to work.” *Id.*; 20 C.F.R. §§ 404.1513, 416.913; *see*
4 *also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) (“[F]riends and family
5 members in a position to observe a claimant's symptoms and daily activities are
6 competent to testify as to her condition.”). If lay testimony is rejected, the ALJ
7 ““must give reasons that are germane to each witness.”” *Nguyen v. Chater*, 100
8 F.3d 1462, 1467 (9th Cir. 1996) (citing *Dodrill*, 12 F.3d at 919).

9 First, the ALJ found Ms. Potter’s opinion was inconsistent with the objective
10 evidence as a whole. Tr. 40. Inconsistency with the medical evidence is a
11 germane reason for rejecting lay witness testimony. *See Bayliss*, 427 F.3d at 1218;
12 *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001) (germane reasons include
13 inconsistency with medical evidence, activities, and reports). Specifically, Ms.
14 Potter opined that Plaintiff has been sober for the entire time Ms. Potter knew
15 Plaintiff, beginning approximately December 2013. Tr. 356. However, as
16 discussed *supra*, substantial evidence in the record shows Plaintiff was abusing
17 drugs during this time period. *See* Tr. 655, 663, 861, 909, 913. Furthermore, the
18 ALJ observed that Ms. Potter primarily opined on Plaintiff’s physical functioning,
19 while the record as a whole indicated that Plaintiff’s mental impairments were
20 more limiting than her physical impairments. Tr. 40. The inconsistencies between

1 Ms. Potter's report and the medical record as a whole were a germane reason for
2 the ALJ to discredit Ms. Potter's opinion.

3 Second, the ALJ found Ms. Potter's opinion was entitled to less weight
4 because she has no medical training. Tr. 40. "[M]edical diagnoses are beyond the
5 competence of lay witnesses and therefore do not constitute competent evidence."
6 *Nguyen*, 100 F.3d at 1467. However, lay testimony "as to a claimant's symptoms
7 or how an impairment affects ability to work *is* competent evidence." *Id.*
8 (emphasis in original). Here, Ms. Potter opined that Plaintiff's dual diagnoses of
9 bipolar disorder and addiction caused Plaintiff to engage in certain thought
10 processes that contribute to her mental and physical limitations. Tr. 356. The ALJ
11 reasonably concluded that these opinions were outside the scope of Ms. Potter's
12 competency as a lay witness. Tr. 40. This was a germane reason to discredit Ms.
13 Potter's opinion.

14 Third, the ALJ found Ms. Potter's opinion was rendered on an opinion
15 reserved to the Commissioner. Tr. 40. Opinions on the ultimate issue of disability
16 are an issue reserved to the Commissioner. 20 C.F.R. § 404.1527(c); *see also*
17 *Wickramasekera v. Astrue*, No. CV 09-449-TUC-HCE, 2010 WL 3883241, at *34
18 (D. Ariz. Sept. 29, 2010) (applying regulation to lay witness testimony). Ms.
19 Potter opined that Plaintiff is unable to work. Tr. 357. The ALJ reasonably
20

1 rejected this conclusion as an issue reserved to the commissioner. Tr. 40. This
2 was a germane reason to discredit this portion of Ms. Potter's opinion.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, this court concludes the
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, ECF No. 21, is DENIED.
8 2. Defendant's Motion for Summary Judgment, ECF No. 22, is GRANTED.
9 3. The Court enter JUDGMENT in favor of Defendant.

10 The District Court Executive is directed to file this Order, provide copies to
11 counsel, and CLOSE THE FILE.

12 DATED September 10, 2018.

13 s/Mary K. Dimke
14 MARY K. DIMKE
15 UNITED STATES MAGISTRATE JUDGE
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